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5 UNITED STATES DISTRICT COURT
6 DISTRICT OF NEVADA

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8 ANTHONY CROSS,

9 Plaintiff,

Case No. 3:13-cv-00433-MMD-WGC

10 v.

ORDER

11 RON JAEGER, et al.,

12 Defendants.

13 After summary judgment proceedings, Plaintiff's retaliation claims based on
14 Defendant's refusal to give Plaintiff the Disciplinary Form III and Defendant's handling of
15 the Emergency Grievance in violation of the First Amendment and Article 1, Section 9 of
16 the Nevada Constitution remain to be tried. (ECF No. 313.) This Order addresses
17 numerous motions pending before the Court.¹

18 Plaintiff's motion to withdraw his first motion in limine (ECF No 317) for failure to
19 comply with LR 16-3(a) is granted. (ECF No. 368.) Plaintiff's first motion in limine (ECF
20 No. 317) is deemed withdrawn. Plaintiff's motion for leave to file a reply to his first
21 motion in limine (ECF No. 349) is denied as moot.

22 The Court will address the remaining motions.

23 **I. MOTION FOR RECONSIDERATION – ECF No. 316**

24 Plaintiff's motion for reconsideration asks the Court to reconsider its decision to
25 grant summary judgment on Plaintiff's access to court claims (ECF No. 313).² (ECF No.

26 ¹The various motions relating to the Court's order for Plaintiff to participate in a
27 settlement conference will be addressed separately.

28 ²The motion was docketed as a motion for reconsideration relating to ECF No.
314, but the text of the motion addresses ECF No. 313.

1 316.) A motion to reconsider must set forth “some valid reason why the court should
2 reconsider its prior decision” and set “forth facts or law of a strongly convincing nature to
3 persuade the court to reverse its prior decision.” *Frasure v. United States*, 256
4 F.Supp.2d 1180, 1183 (D. Nev. 2003). Reconsideration is appropriate if this Court “(1) is
5 presented with newly discovered evidence, (2) committed clear error or the initial
6 decision was manifestly unjust, or (3) if there is an intervening change in controlling
7 law.” *Sch. Dist. No. 1J v. Acands, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Plaintiff’s
8 motion shows that he disagrees with the Court’s reasoning, but such disagreement
9 alone is not enough to warrant reconsideration. Plaintiff’s motion (ECF No. 316) is
10 therefore denied.

11 **II. ECF Nos. 321-326**

12 Plaintiff asks the Court to direct his presence and that of certain inmate
13 witnesses to appear at trial. The Court will direct that Plaintiff be transported to court for
14 trial once trial is set. The Court will set a pre-trial status conference to address the
15 witness presentation, whether in person or by video conference, once trial is set.
16 Accordingly, Plaintiff’s petition for writ of habeas corpus testificandum with respect to
17 Plaintiff (ECF No 322) is denied as moot. The remaining petitions (ECF Nos. 323-326)
18 are denied without prejudice. Plaintiff’s motion for witness testimonies (ECF No. 321) is
19 also denied without prejudice.

20 **III. ECF Nos. 327, 350 and 352**

21 Plaintiff contends that his pendant state law claim—retaliation based on
22 Defendant’s refusal to give Plaintiff the Disciplinary Form III and Defendant’s handling of
23 the Emergency Grievance in violation of Article 1, Section 9 of the Nevada
24 Constitution—permits the Court to direct Defendant to provide certain information for
25 use at trial. The Court disagrees. Plaintiff is entitled to conduct discovery pursuant to
26 Fed. R. Civ. P. 26(b) during the time period permitted for discovery in this case.
27 Whether information obtained in discovery is admissible at trial is an issue that the
28 Court will resolve during the course of trial. Plaintiff is not entitled to have Defendant

1 provide information simply because his state law claim survived summary judgment. For
2 example, the motion docketed as ECF No. 350 asks the Court to direct “Administrative
3 Officials” to provide information relating to certain ESP Operating Procedures. (ECF No.
4 350.) The motion docketed as ECF No. 352 asks the Court to direct “Administrative
5 Officials” to provide the grievance documents of inmate Anthony Mendel.³ (ECF No.
6 352.) Thus, Plaintiff’s two motions asking for “Administrative Officials” to provide certain
7 information (ECF Nos. 350, 352) are denied.

8 In the motion docketed as ECF No. 327, Plaintiff asks the Court to direct
9 “Administrative Officials” to respond to a grievance he initiated on July 2, 2015,
10 requesting information regarding Southern Desert Correction Center shift supervisor
11 position on September 30, 2011.⁴ (ECF No. 327.) The July 2, 2015, grievance is not the
12 basis of the claims in this case. Plaintiff’s motion to compel such a response (ECF No.
13 327) is denied.

14 **IV. ECF No. 346**

15 Plaintiff filed another motion for appointment of counsel, arguing that counsel
16 should be appointed because the case turns on the question of credibility. (ECF No.
17 318.) In appealing the Magistrate Judge’s decision to deny his motion (ECF No. 337),
18 Plaintiff argues that Judge Cobb’s ruling is clearly erroneous because Judge Cobb
19 relies on decisions that are more than fifteen years old without taking into consideration
20 Plaintiff’s unique position in this case. (ECF No. 346.) First and foremost, the cases that
21 Judge Cobb relied upon explain the applicable standards governing appointment of
22 counsel in § 1983 cases. (ECF No. 337 at 1-2.) As Judge Cobb correctly found in
23 reliance upon *Palmer v Valdez*, 560 F.3d 965, 970 (9th Cir 2009) (cert. denied 559 U.S.
24 906 (2010)), Plaintiff has failed to demonstrate exceptional circumstances exist here to

25 ³Moreover, Plaintiff attempted through his request for production of document
26 (request no. 1) to obtain Mendel’s grievance documents. (ECF No. 82-1 at 3.) The
27 Magistrate Judge sustained Defendant’s objection to that request and this Court
affirmed. (ECF No. 116 at 3; ECF No. 211 at 4-5.)

28 ⁴The issue of whether Defendant was a shift supervisor when he addressed
Plaintiff’s emergency grievance has been repeatedly litigated in this case.

1 warrant appointment of counsel for the limited purposes of presenting Plaintiff's direct
2 examination.⁵ The claims remaining do not involve any complex issues and Plaintiff has
3 been able to articulate and prosecute his claims. The fact that the jury will be presented
4 with the issue of credibility does not make this case exceptional. Most, if not all, cases
5 depend on the parties' credibility. Moreover, Plaintiff will be permitted to present his
6 testimony through a narrative form if he chooses and as long as he complies with the
7 evidentiary rules and the Court's rulings. The Court therefore overrules Plaintiff's appeal
8 of the Magistrate Judge's order denying his motion for appointment of counsel (ECF No.
9 346).

10 **V. ECF No. 348**

11 Plaintiff asks the Court to direct transcription of the recording of a disciplinary
12 hearing or have the proper equipment to play the recording. (ECF No. 348.) To the
13 extent Plaintiff requests that the Court direct Defendants to transcribe the recording or
14 pay for the cost of such transcription, Plaintiff's request is denied. The Court agrees with
15 Defendant that Plaintiff's *in forma pauperis* status does not entitle him to shift the
16 expenses relating to trial exhibits to Defendant. Assuming the recording is admitted,
17 Plaintiff will be permitted to play the recording to the jury. Should the jury wish to listen
18 to the recording during their deliberation, they will be permitted to do so. Plaintiff's
19 motion (ECF No. 348) is denied.

20 **VI. ECF No. 353**

21 Plaintiff asks the Court to exclude information relating to the charge that led to
22 the disciplinary hearing at issue in this case and is essentially a motion in limine. See
23 *United States v. Heller*, 551 F.3d 1108, 1111 (9th Cir.2009) (A motion in limine is a
24 procedural mechanism to limit in advance testimony or evidence in a particular area.).
25 However, Plaintiff fails to certify that the parties have met and conferred and have been

26 ⁵Plaintiff relies on *Solis v. County of Los Angeles*, 514 F.3d 946 (9th Cir. 2008) to
27 argue that a jury trial is different. (ECF No. 346 at 2.) However, in *Solis*, the Ninth Circuit
28 reversed the district court's decision to deny counsel because the district court failed to
explain its reasoning, not because the court found that the plaintiff would be proceeding
to a jury trial. *Id.* at 958.

1 unable to resolve this issue as required under LR 16-2(a).⁶ *United States v. Heller*, 551
2 F.3d 1108, 1111 (9th Cir.2009). The Court therefore denies Plaintiff's motion (ECF No.
3 353) without prejudice.

4 **VII. ECF No. 376**

5 The Magistrate Judge denied Plaintiff's emergency motion directing NDOC to
6 preserve Medel's grievance files because Defendant indicated in his opposition brief
7 that a litigation hold has been requested. (ECF No. 364.) Plaintiff appeals the Magistrate
8 Judge's ruling, arguing that Judge Cobb has abused his discretion and presenting
9 numerous questions relating to Defendant's response. (ECF No. 376.)

10 The Magistrate Judge's ruling on Plaintiff's emergency motion relates to a pretrial
11 matter that magistrate judges are authorized to resolve subject to district court review
12 under a "clearly erroneous or contrary to law" standard. 28 U.S.C. § 636(b)(1)(A); see
13 *also* Fed. R. Civ. P. 72(a); L.R. IB 3-1(a) ("A district judge may reconsider any pretrial
14 matter referred to a magistrate judge in a civil or criminal case pursuant to LR IB 1-3,
15 where it has been shown that the magistrate judge's ruling is clearly erroneous or
16 contrary to law.")

17 Judge Cobb construed Defendant's opposition to Plaintiff's motion to preserve
18 Medel's grievance files as a concession that the files would be preserved through a
19 litigation hold.⁷ Plaintiff has failed to demonstrate that Judge Cobb's ruling is clearly
20 erroneous. The Court thus overrules Plaintiff's appeal of the Magistrate Judge's ruling
21 (ECF No. 376).

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23 ⁶In a subsequent motion to withdraw his first motion in limine, Plaintiff asserts
24 that the law librarian forwarded a dated copy of the Court's Local Rules and he was not
aware of this certification requirement under the current Local Rules which were
amended in May 2016. (ECF No. 368.)

25 ⁷In response to Plaintiff's objection, counsel for Defendant again reiterated
26 counsel's request to NDOC to place a litigation hold on Medel's grievance files, which
27 remains in effect until the case is closed, including appeals. This litigation hold should
28 suffice to preserve Medel's grievance files pending any appeals in light of the Court's
decision to deny Plaintiff's motion to compel production of Medel's grievance documents
for trial. In other words, Medel's grievance documents from September 2011 should be
preserved until close of this case, including any appeals.

1 **VIII. ECF No. 378**

2 Plaintiff's motion in limine seeks to exclude what he characterizes as "perjured
3 evidence," which includes Defendant's discovery responses relating to Defendant's shift
4 supervisor position and whether Defendant was authorized to handle emergency
5 grievances in September 2011. (ECF No. 378.) Defendant responds that Plaintiff is
6 improperly trying to limit Defendant from responding to Plaintiff's allegation.⁸ (ECF No.
7 381.)

8 A motion in limine involves a preliminary ruling that is entirely within the
9 discretion of the Court. See *Luce v. United States*, 469 U.S. 38, 41-42 (1984). In
10 addition, limine rulings are provisional and "are not binding on the trial judge [who] may
11 always change his mind during the course of a trial." *Ohler v. United States*, 529 U.S.
12 753, 758 n. 3 (2000); accord *Luce*, 469 U.S. at 41 (noting that in limine rulings are
13 always subject to change, especially if the evidence unfolds in an unanticipated
14 manner).

15 Plaintiff's motion asks the Court to resolve the questions of credibility and weight
16 of the evidence in his favor, but these questions are reserved for the jury to decide. For
17 example, Plaintiff points to the absence of any NDOC documents authorizing Defendant
18 to act as the shift supervisor as support for his contention of "perjured evidence." (ECF
19 No. 378 at 2.) However, whether Defendant had authority to act as the shift supervisor
20 is an issue that will need to be decided by the jury. The lack of any documents to
21 support Defendant's authority to act goes to the weight of Defendant's evidence.
22 Plaintiff also cites to the Court's Order relating to the motions for summary judgment to
23 support his claim of "perjured evidence." (*Id.* at 3-4.) The Court's Order merely pointed
24 out Plaintiff's proffered evidence and found that a reasonable jury could find in Plaintiff's
25 favor. The Order underscores the need for the disputed evidence—Defendant's
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27 ⁸Plaintiff filed a reply to Defendant's response. (ECF No. 385.) LR 16-3(a)
28 provides that a reply will only be permitted with leave of court. Plaintiff failed to obtain
leave of court to file his reply. The Court will strike Plaintiff's reply (ECF No. 385.)

1 authority to address Plaintiff's emergency grievance—to be considered and resolved by
2 a jury. For these reasons, Plaintiff's motion in limine (ECF No. 378) is denied.

3 **IX. ECF Nos. 380 and 394**

4 Plaintiff seeks leave to file a second amended complaint to add three additional
5 defendants, including counsel for Defendant (Benjamin R. Johnson) for "aiding and
6 abetting, conspiracy to commit and or suborn perjury and obstruction of justice." (ECF
7 No. 380.) On March 27, 2017, Plaintiff filed a motion for leave to file a third amended
8 complaint. (ECF No. 394.) The only difference between Plaintiff's two motions appear to
9 be the additional statements about the discovery needed to support Plaintiff's new
10 proposed claims. (ECF No. 394 at 6.) The claims are based on these individuals'
11 participation in Defendant's responses in this case. (*Id.*)

12 Because Plaintiff seeks leave to amend his complaint after the deadline for
13 amendment set forth in the Scheduling Order,⁹ Plaintiff must demonstrate "good cause"
14 as to why the Court should modify the scheduling order to grant him leave to amend his
15 complaint after the deadline. See Fed. R. Civ. P. 16(b)(4). "Rule 16(b)'s 'good cause'
16 standard primarily considers the diligence of the party seeking the amendment."
17 *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992).

18 Plaintiff has not and cannot demonstrate "good cause" to support his motions.
19 Based on his own account, Plaintiff had knowledge of the purported conduct of the
20 proposed named defendants in September 2015 at the latest (ECF No. 380 at 5-6). Yet,
21 Plaintiff waited until January 2, 2017, over a year later and over four months after the
22 Court ruled on the parties' motions for summary judgment, to request leave to amend.
23 The Court agrees with Defendant that granting leave to amend at this time would be
24 prejudicial to Defendant. Plaintiff's motions for leave to amend his complaint (ECF Nos.
25 380 and 394) are denied.¹⁰

26 ⁹The Scheduling Order set November 28, 2014 as the deadline for amending the
27 complaint. (ECF No. 27.)

28 ¹⁰Because Plaintiff has not demonstrated good cause to support his motion, the
Court need not address whether amendment would be futile.

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